

No. 17-7855/17A900
CAPITAL CASE

IN THE SUPREME COURT OF THE UNITED STATES

◆
DOYLE HAMM,
Petitioner,

v.

STATE OF ALABAMA,
Respondent.

◆
On Petition for a Writ of Certiorari to the
Alabama Supreme Court

BRIEF IN OPPOSITION TO HAMM'S PETITION FOR
WRIT OF CERTIORARI AND APPLICATION FOR STAY OF
EXECUTION

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February 22, 2018

EXECUTION SCHEDULED FOR FEBRUARY 22, 2018

QUESTION PRESENTED

(Rephrased)

Did the district court abuse its discretion in finding that Hamm failed to demonstrate a significant likelihood of success on the merits of his as-applied Eighth Amendment claim pertaining to his alleged compromised veins where an independent medical expert found that Hamm had suitable peripheral veins in his lower extremities sufficient for intravenous access?

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INTRODUCTION

This is a straightforward case that is particularly unworthy of certiorari review, much less a stay of execution. Hamm's case involves a narrow, belatedly raised as-applied Eighth Amendment challenge, in which he contends that he has insufficient intravenous (IV) access to carry out his execution by lethal injection. In compliance with a remand directive from the Eleventh Circuit, the district court appointed an independent medical expert (IME), who examined Hamm and determined that he had sufficiently accessible peripheral veins. Based on this medical evidence from the court-appointed expert, the district court made factual findings that Hamm could not establish a substantial likelihood of success on the merits of his as-applied Eighth-Amendment claim, holding that Hamm was not entitled to stay. Doc. 58.

As the Eleventh Circuit's thorough opinion affirming the denial of a stay explains, Hamm cannot point to any error in the district court's factual findings that would establish an abuse of discretion. Indeed, he does not present any novel legal theory to this Court for review, but rather essentially asks this Court to grant a stay only because he disagrees with the factual findings made by the district court based on the IME's evaluation—an evaluation that Hamm originally sought. Doc. 23 at 5. But the district court's findings are well-supported by the IME's report.

The IME inspected Hamm's extremities and several central veins by both palpation and ultrasound examination, and concluded that Hamm has accessible peripheral veins in both legs as well as central venous access unhindered by

lymphadenopathy. Doc. 58, App'x A at 8, 10–11, 13–14. While the IME found that the veins in Hamm's arms would not be "readily accessible without difficulty," *id.* at 14, he determined that the great saphenous veins in both of Hamm's legs were accessible and that it would not be necessary to attempt central venous access. *Id.*

At a hearing the next morning, the district court first detailed how difficult the task of finding an independent medical expert was and the lengthy steps undertaken to find a qualified, willing medical professional. App'x, Tab 7 at 4–6. The district court relayed the IME's preliminary findings, which were largely in line with the affidavits previously provided from the medical team at Donaldson Correctional Facility—who, unlike Hamm's experts, have treated Hamm for years. Seeking to make Hamm's execution as safe as possible, the district court asked whether the Alabama Department of Corrections (ADOC) would stipulate that the execution team will not attempt peripheral access through Hamm's upper extremities. Doc. 58 at 6. The ADOC agreed. Nothing in the ADOC's lethal injection protocol prohibits peripheral access through the legs instead of the arms, nor does the protocol mandate that IV access be obtained solely through the upper extremities. On February 20, the district court concluded that in light of the IME's findings, Hamm failed to show a substantial likelihood of success on the merits of his as-applied challenge and denied Hamm's request for a preliminary injunction. Doc. 58 at 6–7.

Because he received the examination he requested and the evidence does not support his allegations, Hamm now resorts to raising hyperbolic arguments, far afield from what he argued in his complaint. Hamm criticizes the process by which the

district court appointed an IME, asserts baseless accusations against the IME's qualifications, and argues more generally against the process that lower federal courts overall address as-applied lethal injection challenges involving older inmates. The truth of the matter is that the district court did everything in its power to provide the independent medical examination that Hamm originally requested on a compressed schedule due to Hamm's delay in filing this lawsuit until his execution was set. More importantly, none of these arguments entitle him to the relief he seeks. Hamm's claim was that he has compromised veins that prevent him from being executed by lethal injection. That claim was refuted by medical evidence. Thus, as the district court correctly found, Hamm has not (and cannot) establish a substantial likelihood of success on the merits of his as-applied challenge because he has sufficient peripheral venous access and no lymphadenopathy obstructing central venous access. This Court should deny the requested stay, deny certiorari, and allow Hamm's long-overdue execution to proceed as scheduled.

STATEMENT OF THE CASE

A. Hamm's crime and appeals

The crime that landed Hamm on death row was the final act in an interstate robbery-murder spree. On January 24, 1987, Hamm and his accomplices committed one robbery-murder in Tishomingo County, Mississippi, then crossed into Alabama, eventually making their way to Cullman. Late that evening, they held up Patrick Cunningham, a motel desk clerk, at gunpoint. By the time the police arrived, Cunningham was dead from a .38 caliber bullet to the temple, and the killers had taken roughly \$410 from him and the motel's cash drawer. Thanks to an eyewitness and the assistance of Mississippi law enforcement, Hamm and two of his accomplices were taken into custody the next day. Another two accomplices, who had originally posed as kidnapping victims of Hamm's, turned state's evidence. When officers searched the trailer where Hamm was hiding, they found clothing matching the eyewitness's description, knives, and a .38 caliber pistol that was determined to be the murder weapon. Although he initially denied involvement, Hamm confessed to the robbery-murder. *Hamm v. State*, 564 So. 2d 453, 455–57, 460, 466 (Ala. Crim. App. 1989).

Hamm was tried and convicted in September 1987, and the jury recommended 11–1 that he be sentenced to death.¹ After a separate sentencing hearing, the trial court conducted its own weighing of the aggravating and mitigating evidence and

1. In 1989, Hamm was convicted of murder and kidnapping in Tishomingo County, Mississippi, and received a life sentence. *Inmate Search*, MISS. DEP'T OF CORR., <https://www.ms.gov/mdoc/inmate/Search> (last visited Feb. 15, 2018).

adopted the jury's recommendation. *Id.* at 469. The Alabama Court of Criminal Appeals affirmed Hamm's conviction and death sentence in 1989, *id.* at 464, as did the Alabama Supreme Court in 1990. *Ex parte Hamm*, 564 So. 2d 469 (Ala. 1990). This Court denied certiorari. *Hamm v. Alabama*, 498 U.S 1008 (1990) (mem.).

Hamm's state postconviction (Rule 32) proceedings were protracted, largely due to problems created by his current counsel. In brief, Hamm's counsel filed a Rule 32 petition in December 1991 and continued to file on Hamm's behalf for the next several years. In April 1998, counsel sent a letter to the circuit judge, requesting his assistance in "resolving" Hamm's case; he proffered the bizarre notion that Hamm be transferred to Mississippi to serve his life sentence instead of being executed in Alabama and asked that the court initiate discussion with the State. He also noted that he had taken a teaching position in Arizona and was looking for substitute pro bono counsel. The court interpreted this letter as a motion to withdraw and appointed new counsel. When counsel filed a motion in 1999 asking to be reappointed, the court responded with an extensive order detailing the trouble it had in contacting counsel over the years and all of the continuances it had granted. In sum, the court stated:

This Court has experienced nothing but frustration in dealing with Mr. Harcourt, and frankly would have served him with a show cause order of contempt if he had been physically within the jurisdiction of this Court in April 1998. . . .

The Court finds that Mr. Harcourt has obstructed the orderly progress of this case, either intentionally or carelessly, and that said obstruction is not in Mr. Hamm's best interest. Mr. Hamm is entitled to have his case proceed through the Rule 32 process and the appeals process in an orderly manner, without interference from Mr. Harcourt.

Hamm v. State, 913 So. 2d 460, 468–70 (Ala. Crim. App. 2002). After a hearing in 1999, the circuit court denied Hamm’s Rule 32 petition. In so doing, the court adopted verbatim the State’s proposed order, which is entirely permissible under Alabama law. *Id.* at 474–75. The Court of Criminal Appeals affirmed the denial in 2002, *id.* at 493, and the Alabama Supreme Court denied certiorari in 2005, *Ex parte Hamm*, No. 10011483 (Ala. May 20, 2005), as did this Court. *Hamm v. Alabama*, 546 U.S. 1017 (2005) (mem.).

Hamm turned then to the federal courts, initiating habeas proceedings in the Northern District of Alabama in 2006. The district court denied his habeas petition in 2013, *Hamm v. Allen*, 5:06-cv-945, 2013 WL 1282129 (N.D. Ala. Mar. 27, 2013), the Eleventh Circuit Court of Appeals affirmed in 2015, *Hamm v. Comm’r, Ala. Dep’t of Corrs.*, 620 F. App’x 752 (11th Cir. 2015), and once again, this Court denied certiorari in October 2016. *Hamm v. Allen*, 137 S. Ct. 39 (2016) (mem.).

B. Hamm’s 42 U.S.C. § 1983 proceedings

The vehicle that brought Hamm before this Court was a 42 U.S.C. § 1983 complaint alleging an as-applied challenge to Alabama’s lethal injection protocol. Hamm’s complaint was grossly untimely.

While Hamm was initially sentenced to die by electrocution, Alabama switched to lethal injection on July 1, 2002. ALA. CODE § 15-18-82.1 (1975). Inmates like Hamm were given thirty days to elect whether their death sentence would still be carried out by electrocution. *Id.* § 15-18-82.1(b). Hamm failed to make such election, and thus, lethal injection became the manner in which he would be executed on July 31, 2002. *Id.* Since 2002, the Alabama Department of Corrections’ protocol has required the

intravenous administration of a three-drug sequence consisting of an anesthetic, a paralytic, and a drug that causes cardiac arrest.

As early as 2003, Alabama inmates began filing § 1983 actions challenging the protocol relating to the ADOC's ability to obtain intravenous access. For example, in another Alabama case, *Nelson v. Campbell*, 541 U.S. 637 (2004), an inmate claimed that his compromised veins made IV access impossible. Hamm, however, made no effort to raise a similar Eighth Amendment claim.

In early 2014, Hamm was diagnosed with ocular lymphoma. He was treated in July 2014, received a positive prognosis by September 2015, and has been in remission since 2016. Doc. 20-15 at 2. Still, Hamm filed no challenge concerning his execution.

As discussed above, Hamm's federal habeas proceedings ended in October 2016. As this point, "it should have been clear to him that a denial of the petition would remove the final obstacle to lifting the state-court automatic stay of execution." *Williams v. Allen*, 496 F.3d 1210, 1213 (11th Cir. 2007). Again, Hamm took no action.

On June 23, 2017, the State moved the Alabama Supreme Court to set Hamm's execution date. Even this action did not trigger Hamm to assert any federal claim regarding the manner of his execution. Instead, on August 8, he elected to file a response to the State's motion in the Alabama Supreme Court, contending that "IV access may not be possible" and noting that his expert, Dr. Mark Heath, had preliminarily concluded that "it is reasonably certain that IV access for Mr. Hamm,

both peripheral and central-line, may be impossible and, if achievable, will be extraordinarily difficult, challenging, arduous, painful, and bloody.” Doc. 20-13 at 2.

On December 13, the Alabama Supreme Court set Hamm’s execution for February 22, 2018. Later that day—a mere ten weeks before his scheduled execution—Hamm finally initiated this § 1983 action, claiming that his veins were too compromised and that swollen lymph nodes might prevent the ADOC from carrying out a constitutional execution. He proffered two expert witnesses: Dr. Heath, an anesthesiologist who makes frequent appearances in lethal injection litigation on behalf of inmates, and Dr. Charles Blanke, a doctor from Oregon who specializes in physician-assisted suicide. While Dr. Blanke never actually examined Hamm, Dr. Heath visited Donaldson Correctional Facility on September 23, 2017, with Hamm’s counsel, Bernard Harcourt. He examined Hamm’s peripheral veins, both unaided and using counsel’s necktie as a makeshift tourniquet, and reported the following:

- Hamm has “extremely poor peripheral venous access,” which will likely require the use of central IV access;
- Hamm has no accessible veins on his left arm/hand or on either leg/foot;
- Hamm has one “small, tortuous” vein on his right hand that might be accessed with a butterfly needle, which would make the insertion of an IV catheter “challenging”;
- Hamm reports “intermittent waxing and waning tumors on his chest, neck, and groins,” which “likely represents lymphadenopathy,” and Hamm has “active B-cell lymphoma”;

- Dr. Heath was unable to assess accessibility of jugular, subclavian, and femoral veins due to “equipment limitations”; and
- Dr. Heath recommended that an expert like Dr. Warren Bagley, who was called in to assess David Nelson’s veins, be appointed to assess Hamm’s veins.

Presented with Dr. Heath’s report, the State provided affidavits from four medical practitioners at Donaldson Correctional Facility who had been responsible for treating Hamm. One affidavit from a doctor at Donaldson stated that Hamm’s cancer had been in remission since March 2016, that Hamm had no lymphadenopathy as of January 2018, and that Hamm had accessible veins. *See* Docs. 20-15–20-18. In particular, an affidavit from a nurse practitioner with forty-one years’ experience and eight years at Donaldson stated that Hamm had veins in his feet that would accommodate a large-bore catheter of the kind needed for lethal injection.

Initially, after a hearing, the district court entered a stay of execution on February 6 without making the necessary finding that Hamm had presented a substantial likelihood of success on the merits of his underlying claim. Doc. 30. The Eleventh Circuit vacated and reversed on February 13, ordering the district court to have Hamm evaluated by an independent medical expert. *Dunn v. Hamm*, No. 18-10473 (11th Cir. Feb. 13, 2018). Accordingly, the district court retained such an expert, a board-certified surgeon,² who examined Hamm on the afternoon of February 15, much as Dr. Bagley examined the inmate in *Nelson*. After inspecting Hamm’s extremities and several central veins by both palpation and ultrasound examination,

2. The district court ordered that all information regarding the expert’s identity be sealed, and as such, the expert is not identified by name herein.

the expert concluded that Hamm has accessible peripheral veins in both legs as well as central venous access unhindered by any lymphadenopathy. At the district court's request the following morning, the ADOC stipulated that the execution team will not attempt peripheral access through Hamm's upper extremities. On February 20, the district court concluded that in light of the independent medical expert's findings, Hamm failed to show a substantial likelihood of success on the merits of his as-applied challenge and denied Hamm's request for a preliminary injunction. Doc. 61.

Hamm moved for reconsideration, presenting brief statements from his experts calling the independent medical expert's conclusions into doubt but offering no substantive proof to rebut the independent expert's findings. The district court denied the motion.

On February 21, Hamm appealed the district court's decision in the Eleventh Circuit and moved for an emergency stay. Today, the Eleventh Circuit affirmed the district court's denial of a stay of execution, holding that the district court did not abuse its discretion in ruling that Hamm cannot show a significant likelihood of success that an execution by intravenous lethal injection would violate his Eighth Amendment rights because he has two peripheral veins accessible for a lethal injection and his central veins are likewise accessible for a lethal injection. Or. 17.

REASONS FOR DENYING THE PETITION

I. Hamm cannot establish a substantial likelihood of success on his as-applied Eighth Amendment claim because he has peripheral venous access.

As set out above, the district court correctly found that Hamm failed to meet the requirements for a stay of execution because he failed to present facts showing a substantial likelihood of success on the merits of his as-applied Eighth Amendment challenge. Specifically, the district court, relying on the court-appointed IME's examination, found that the evidence demonstrated that Hamm "has adequate peripheral *and* central venous access for intravenous lethal injection of a large amount of fluid." Doc. 58 at 6. Thus, Hamm's request for a stay and his petition for writ of certiorari should be denied.

In his amended complaint, Hamm contends that the ADOC's lethal injection protocol is sure or very likely to result in extreme pain or suffering as-applied to him because he has "severely compromised" veins. He claims that because his veins are so poor, peripheral IV access will be impossible, and the execution team will then need to attempt central IV access. Hamm posits that obtaining central venous access is not only a more difficult procedure but will also be compounded by his allegedly swollen lymph nodes, the possible side effect of his alleged cancer. Doc. 15 at 22–23.

Hamm's allegations concerning his IV access have been refuted by the medical evidence in this case. As noted above, the district court retained an IME to evaluate Hamm on February 15. The IME, using both palpation and ultrasound examination, found that Hamm has accessible peripheral veins in both legs and

central veins unobstructed by lymphadenopathy. Doc. 58, App'x A at 10–11, 13–14. Further, the IME found that “[g]iven the accessibility of the peripheral veins listed above, it is my medical opinion that cannulation of the central veins will not be necessary to obtain venous access.” Doc. 58 at 15. In light of the IME’s findings, the district court determined that Hamm failed to show a substantial likelihood of success on his as-applied challenge. Doc. 58 at 6–7.

Hamm simply cannot show that the district court erred in any way in relying on these findings in denying his request for a stay. The district court’s findings were correct and proper. Indeed, the court’s findings and the IME’s examination are consistent with the evidence presented by the State from the medical professionals at Donaldson who, unlike Hamm’s experts, had actually treated Hamm. The affidavits from the Donaldson doctor and nurse were discussed above, and they confirm the conclusion that Hamm has sufficient peripheral IV access. Docs. 20-15, 20-16.

In contrast, Hamm’s claim is based upon the contentions of Dr. Mark Heath, an anesthesiologist who has made a second career as an expert witness in lethal injection challenges like Hamm’s.³ But Dr. Heath’s tale of possible lymphoma

³. Dr. Heath has appeared in numerous capital cases, always on the inmate’s behalf. His expert declarations available on Westlaw include documents 2014 WL 12614761 (S.D. Miss.), 2013 WL 9659470 (W.D. Mo.), 2011 WL 7637401 (D. Idaho), 2011 WL 10894651 (N.C. Super.), 2011 WL 2533322 (N.D. Ga.), 2008 WL 8257723 (D. Ariz.), 2008 WL 6966355 (W.D. Okla.), 2008 WL 7765162 E.D. Ark.), 2008 WL 7809588 (Cir. Ct. Ark.), 2007 WL 9210164 (Va. Cir. Ct.), 2007 WL 7209884 (N.D. Miss.), 2007 WL 7672521 (Tex. Dist.), 2007 WL 1362495 (M.D. Tenn.), 2006 WL 3761222 (N.D. Cal.), 2006 WL 6897617 (S.D. Ohio), 2006 WL 6606558 (S.D. Tex.), 2006 WL 4958024 (E.D. Ark.), 2006 WL 2851089 (D. Mont.), 2006 WL 6502979 (W.D. Mo.), 2004 WL 5003232, 2004 WL 5003231 (N.D. Cal.),

(diagnosed without the assistance of any medical equipment beyond counsel's necktie) and only one "small, tortuous" vein available for peripheral access is unfounded. Doc. 1-1. Indeed, his conclusion that Hamm has no accessible veins in his legs and potentially obstructive lymph nodes is belied by the full examination and report of the IME, who is a board-certified surgeon and who is not a professional lethal-injection expert witness. In other words, the IME proved that Dr. Heath's report was unfounded, if not materially false.

Simply put, Hamm has no factual basis for an as-applied Eighth Amendment challenge, much less a substantial likelihood of success on the merits. The IME has determined that Hamm has peripheral IV access. Even if he did not, he has no lymphadenopathy sufficient to prevent the execution team from obtaining central IV access. As for his alleged cancer, Hamm's lymphoma has been in remission since March 2016, and Dr. Roddam also found no evidence of lymphadenopathy in January 2018. Doc. 12-4 at 2. Currently, Hamm has no diagnosed cancer beyond a basal cell carcinoma on his left cheek. Basal cell carcinomas are the most frequently occurring form of skin cancer and rarely metastasize beyond the original site, *Basal Cell Carcinoma (BCC)*, SKIN CANCER FOUNDATION, <https://www.skincancer.org/skin-cancer-information/basal-cell-carcinoma> (last visited Feb. 20, 2018), and thus, it is highly unlikely that Hamm is suffering from self-diagnosed lymphoma so severe that he cannot be executed in a constitutional fashion.

2003 WL 25444179 (M.D. Ala.), and 2002 WL 34586752 (Prince William Cty. (Va.) Cir. Ct.).

Hamm's focus on the IME's finding that he has small or difficult veins in his arms, ignores the expert's overall finding that *Hamm has peripheral venous access*. Doc. 58, App'x A at 14. That Hamm may have small veins in some limbs is immaterial when it has been established that he has sufficiently large, unobstructed veins for a lethal injection. That Hamm may have one or two swollen lymph nodes is immaterial when it has been established that these lymph nodes do not obstruct central venous access—again, a procedure that the IME believes will be unnecessary because of the veins in Hamm's legs. Indeed, as Hamm must admit, the IME found that he has accessible veins on his lower extremities. Doc. 58 at 5.

II. Hamm's general statements about how federal courts litigate challenges to lethal injection protocols are not properly before this Court, are unworthy of certiorari review, and do not establish a substantial likelihood of success on the merits of Hamm's Eighth Amendment claim.

Because the evidence refutes his allegation that he does not have sufficient IV access, Hamm's petition to this Court largely ignores the factual findings made by the courts below. Indeed, the petition reads more like a law review article full of general commentary on how Hamm believes lethal injection challenges should be litigated. Hamm contends that certiorari should be granted to address (1) how lower federal courts are unsure of how to handle as-applied Eighth Amendment challenges involving older inmates, (2) what role federal courts should have in crafting lethal injection protocols for older inmates, (3) how lower courts should resolve such claims under shortened time frames because of scheduled execution

dates, and (4) what supervisory power this Court has over the lower courts on these matters. Pet. 11–25.

None of these arguments present any ground for certiorari review, nor do they justify a stay of execution. None of the asserted grounds for certiorari even remotely implicate the reasons this Court would grant certiorari review. First, these arguments are not properly presented to this Court. None of these arguments relate to the Eighth Amendment claim that Hamm asserted in his amended complaint. Hamm’s arguments are far afield from the claim that he presented to the district court and was rejected based on the medical evidence in the record, namely, that Alabama’s protocol is unconstitutional as applied to him because he has compromised veins. Ordinarily, “we do not decide in the first instance issues not decided below.” *National Collegiate Athletic Assn. v. Smith*, 525 U.S. 459, 470 (1999). This fact alone precludes certiorari review or a stay.

Second, Hamm’s arguments are unworthy of certiorari review because even if this Court were inclined to consider some of the general statements Hamm raises, Hamm would ultimately not be entitled to relief. At the end of the day, Hamm alleged that he had compromised veins, which meant that his execution would violate the Eighth Amendment as applied to him. But the record refutes the fact: Hamm has accessible veins, and thus, even if this Court wanted to consider theoretical ideas of how lower federal courts should address as-applied challenges, it would not affect his case because he cannot point to clear error in the lower courts’ findings.

Third, Hamm fails to articulate any traditional reason for certiorari review. He provides no important question of federal law to decide. He cites no circuit split. He relies only on concurring and dissenting opinions from this Court. As explained above, the reason Hamm has no compelling legal question to present is because his as-applied challenge presents narrow factual questions concerning his own medical condition that have been refuted by the medical evidence below.

Finally, Hamm's claims are meritless. For instance, Hamm complains about the lower courts involvement in "crafting" individualized lethal injection protocols. Pet 15. This argument is a red herring and ignores what actually transpired in his case. Indeed, the Eleventh Circuit thoroughly refuted this claim, noting that the district court did not craft any new protocol, but rather simply addressed Hamm's as-applied claim within the confines of what Alabama's protocol allows. As the Eleventh Circuit noted, Alabama's protocol does not specify where IVs must be placed and any "deviation" that Hamm complains of would "be a deviation only from Alabama's usual custom, not from its official protocol." Or. 13. Indeed, the ADOC's protocol makes no requirement that the arms be used for IV access.⁴ Rather, the protocol provides that standard procedures for inserting IV lines will be used, and the protocol does not limit IV access to just the hands or arms. The district court did not experiment with the protocol—rather, the court was trying to be accommodating to Hamm through procedures already contemplated by the ADOC protocol.

⁴ Hamm's table of other states' protocols in his brief to the Eleventh Circuit confirms that other states permit IV access through the lower limbs.

Moreover, Hamm’s argument is nonsense. The Eleventh Circuit went on to note that “the procedure the district court approved *is* the protocol designed to protect Hamm from cruel and unusual punishment given the fragile state of his arm veins.” *Id.* And even assuming that Alabama had never performed an intravenous lethal injection via the legs, the Eleventh Circuit properly held that the district court did not abuse its discretion in denying a stay because the IME found that “Hamm’s great saphenous veins would be accessible without issue.” *Id.*

Hamm also argues that the district court had to resolve his claims in an expedited manner which caused him to not obtain an IME of his choice and that the district court erred by not allowing him to question ADOC employees about whether lethal injection via IVs in his legs would violate the Eighth Amendment. Pet. 17–22. Again, none of these claims should error in the district court’s finding of no significant likelihood of success. Moreover, the Eleventh Circuit correctly noted that the district court did not abuse its discretion in these areas. The court held that the district court did not err in denying Hamm’s request to cross-examine ADOC witnesses further because this evidence would go to whether Alabama’s lethal injection protocol would be unconstitutional on its face, as opposed to whether it was unconstitutional only as applied to Hamm. Or. 14–15 (It must also be noted that Hamm did not subpoena any ADOC witnesses to appear at the previous evidentiary hearing held on January 31, 2018). The Eleventh Circuit correctly held that questioning of ADOC witnesses about their experience and training relevant to administering a lethal injection through IVs in the legs “would have been equally

relevant to the cases of every death-row inmate, since lethal injection via the legs is something available for Appellees to use under their protocol in any case, not just Hamm's." *Id.* at 15. As the district court correctly concluded, consideration of such claims "would convert [Hamm's] as-applied challenge into a facial challenge to the lethal injection protocol." Doc. 58 at 4. As such, proceeding on such facial claims would have been improper as such claims would have been time-barred under circuit precedent because any inmate sentenced to death might be subject to IV access via the legs under Alabama's protocol. *See Gissendaner v. Comm'r, Ga. Dep't of Corrs.*, 803 F.3d 565, 569 n.1 (11th Cir. 2015) (in the context of method-of-execution claim, as-applied challenge is "not a challenge to how the protocol was applied generally but a claim that the plaintiff's unique medical condition would enhance the likelihood and severity of a painful death").

The Eleventh Circuit also properly rejected Hamm's argument concerning any delay or rushed proceedings. The Eleventh Circuit rejected this claim noting that even assuming the length of the delays, the district court's procedures for resolving this claim was sufficient to ensure that Hamm was not facing an unconstitutional risk of pain and suffering. Or. 16.

Further, Hamm's complaints over the expedited schedule is utterly meritless as the expedited schedule is attributable to Hamm's actions and the questionable methods he undertook to litigate his case. His federal habeas proceedings ended in October 2016, the State moved to set his execution date in June 2017, and he admits that he received his medical records in July. Yet he delayed in filing his

1983 lawsuit until December 13, 2017, after the Alabama Supreme Court set his execution date. While Hamm contends that he was trying to argue to the Alabama Supreme Court that his execution date should not have been set, he knew from October 2016 that his execution was imminent, and nothing prevented him from filing his lawsuit prior to December 2017. To the extent that Hamm has complaints over the timing of the proceedings below, that onus fell on him and this Court has already addressed this issue, holding that courts must apply “a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay.” *Hill v. McDonough*, 547 U.S. 573, 584 (2006).

Finally, Hamm complains that the wrong type of expert was appointed, but this is yet another red herring. Simply because Hamm wished to have a different expert does not mean that the IME was not qualified to examine his veins. Indeed, Hamm has failed to produce any evidence or argument showing why the IME was nothing but imminently qualified. The IME is a board-certified surgeon who engaged in extensive postgraduate fellowships. Doc. 48. Even Dr. Heath stated that the type of examination that was needed was an examination similar to what was done by the expert in another Alabama case *Nelson*, in which the expert used an ultrasound machine and identified candidate access points. App’x, Tab 2 at 56. The IME did exactly that in this case. While Hamm does not like the fact that the results refute his claims, that does not mean that the district court abused its discretion in any way.

III. Hamm cannot meet the other necessary requirements for a stay of execution to issue.

This Court must consider the State's strong interest in seeing the timely enforcement of Hamm's death sentence and the ADOC's duty to carry out this judgment. *Hill*, 547 U.S. at 584. The grant of a stay would substantially harm the State's ability to fulfill its statutory duties under Alabama law. Moreover, a stay would be adverse to the public's interest in having Alabama's criminal sentences enforced. It has been more than thirty years since Hamm committed his capital murder. Hamm's conviction is valid and a competent state court with jurisdiction over his case set his execution date according to Alabama law. At a minimum, this Court should strongly consider Alabama's interest in enforcing its criminal judgment in weighing the equities against the grant of a stay.

CONCLUSION

Wherefore, for the foregoing reasons, Respondent respectfully requests that this Court deny Hamm's petition for writ of certiorari.

Respectfully submitted,

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BY—

s/ Thomas R. Govan, Jr.*
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